United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

77-7121

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

DORALEE ESTATES, INC.,

Plaintiff-Appellee,

—against—

CITIES SERVICE OIL COMPANY,

Defendant and Third Party Plaintiff-Appellant,

—against—

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY TO THE BRIEF OF DORALEE ESTATES, INC.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-7121

DORALEE ESTATES, INC.,

Plaintiff-Appellee,

-against-

CITIES SERVICE OIL COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY TO THE BRIEF OF DORALEE ESTATES, INC.

Statement

Doralee's[1] brief, in basic organization, deals with proof of liability, proof of damages, both compensa-

1. Doralee Estates, Inc. is referred to throughout as "Doralee"; Cities Service Oil Company is referred to as "Cities Service"; and, MGO Corp. and Monticello Gas & Oil Co., Inc. is referred to collectively as "MGO."

tory and punitive, and the question of errors by the court in the impanelment of the jury and conduct of the trial. It is the purpose of this reply to show that on the question of liability, the plaintiff has utterly failed to refute the showing by Cities Service that there was no basis in fact and law upon which liability could be found. Similarly, with respect to the question of damages, this brief will point out plaintiff's failure to show any basis, on the facts or law, upon which either compensatory or punitive damages could have been found. On the question of error in the allowance of challenges in the jury impanelment, it will be shown that Doralee's brief has utterly ignored the clear statutory mandate of Title 28, United States Code, § 1870 and the decisions relevant thereto. In respect of other errors by the court in the conduct of the trial, it will be shown that plaintiff's brief fails to respond adequately thereto.

ARGUMENT

I

DORALEE'S BRIEF FAILS TO SHOW FACTS OR LAW ESTABLISHING THE LIABILITY OF CITIES SERVICE

The initial sub-point of the first point of Doralee's brief presents the proposition that "Cities Service seeks reversal upon overruled state law". (Doralee Br. at 25).[2] This is an incorrect analysis of the law and of the position of Cities Service.

2. Doralee's brief is cited to throughout as "Doralee Br." MGO's brief at "MGO Br."; and Cities Service's main brief as simply "Br.".

The case of Putnam v. Stout, 38 N.Y.2d 607, 381 N.Y.S. 2d 848, 345 N.E. 2d 319 (1976), referred to in Doralee's brief (at 25), is undoubtedly the controlling law in New York State. However, it has no application to the established facts of this case. Putnam v. Stout, supra, states, that the court

> ...adopt(s) the rule that a lessor may be liable for harm caused to others upon his land with the permission of the lessee, on the basis of his contract to keep the premises in good repair. (emphasis supplied).

Id. at 610, 381 N.Y.S. 2d at 849, 345 N.E. 2d at 321. Neither of the emphasized factors is present in the instant case; the plaintiff did not sustain injuries while upon the lands leased by Cities Service to MGO and the lease between Cities Service and MGO does not require Cities Service to make repairs. To the contrary, the lease expressly provides in paragraph 5 that:

> ...Tenant [MGO] agrees to comply with all laws, rules, regulations and requirements of all governmental authorities having jurisdiction thereof in respect to Tenant's use and occupation of the premises. Tenant's acceptance of possession hereunder shall constitute an acknowledgment of the good and tenantable condition of the premises on the date of commencement of possession hereunder.

(E-105, ¶5). In paragraph 6 the lease provides, in part, that the tenant

> . . . shall maintain the demised premises in good condition during the term of this lease, and shall, at the Tenant's own cost and expense, make all repairs of every nature and description, except structural, to the demised premises....

(E-105), ¶6). Admittedly, the appellant overlooked citing Putnam v. Stout, supra, to this court; but it is clear, under the facts of the instant case, that the decision imposes no liability on Cities Service. Cities Service cited Dick v. Sunbright Steam Laundry, 307 N.Y. 422, 121 N.E. 2d 399 (1954), to show, in the case of off-premises damage, that there could be no liability imposed on a landlord which had not covenanted to repair for off-premises damage. Under Dick v. Sunbright Steam Laundry, supra, no liability for on-premises damage was imposed upon a landlord which had covenanted to repair. Id. Although Putnam v. Stout, supra, now fixes liability for on-premises damage on a landlord obliged to make repairs, it clearly cannot be stretched to impose liability for off-premises damage on a landlord which, like Cities Service herein, has no repair obligation. In this connection, in the instant case even a landlord's covenant to repair might not have imposed liability, since the proof is clear that there was no failure to "repair" any given item of structure or equipment causing the oil spillage. The spillage was found by the New York State Department of Environmental Conservation to be due to the fact that Monticello did not maintain an oil trap (E-16, E-9), that the "surface drains were plugged with snow and being by-passed" and "the oil catch basins were not maintained." (E-17). The trial judge stated:

> Oil traps were clogged with snow and ice. Somebody should have been around there on a daily basis clearing the traps.

(A-856/15-17). It is clear from the record that the cause of the oil spillage was simple - everyday deficiencies in "housekeeping" on the part of MGO. Cities Service, which did not operate or have a presence at the premises, cannot be held chargeable for damage resulting from failure to remove snow which plugged drains and oil traps.

The first point of plaintiff's brief completely ignores the fact, as was uncontrovertibly established by the testimony of MGO's general manager, that at all times with which plaintiff's suit is concerned, the oil plant was in possession and control of MGO and that there were no Cities Service personnel thereat. (A-435/3-A-437/20). It was further established by the testimony of MGO's general manager that all operations at the oil plant terminated on February 10, 1973. (A-430/2-8). It is established by the last paragraph of plaintiff's Exhibit (E-27) that MGO had been paying rent at least through April 23, 1973 (the record does not show when MGO stopped paying rent or surrendered the premises) and that on May 4, 1973 Cities Service engaged a contractor to remove all oil-soaked earth from the premises. (E-34-E-35). These uncontroverted facts make it clear that the oil plant at all relevant operating times was under the control and operation of MGO and that when operations ceased in February 1973, there was not only a termination of any acts of pollution, but also, shortly thereafter, physical removal of the oil-saturated earth at the former plant premises. Since Doralee's brief does not so much as mention appellant's authorities cited (at 22) in its

brief for the proposition that the liability for damage arising from nuisance, trespass and negligence derives only from the acts or omissions of the party in control of the premises, it is self-evident that the plaintiff is unable, against the established law and the uncontroverted proof that MGO alone was in control of the premises, to refute such showing of its non-liability by Cities Service.

In an effort to avoid the clear proof of MGO's total responsibility for the acts underlying Doralee's claim, Doralee, claims (citing A-412, Doralee Br. at 26) that Cities Service's control of the premises from February 10, 1973 to October 1973 is established by Cities Service's claim of possession and control. The transcript reference (A-412) cited by Doralee, contains nothing whatsoever relating to possession and control of the oil plant or to a claim of Cities Service to be in exclusive possession and control of the oil plant. Indeed, as shown above, the trial record contains undisputed evidence, introduced by Doralee itself, which establishes that MGO had been paying rent through April 23, 1972 and that "stop rental notices" had not been issued as of that date. (E-27, last paragraph). In light of this proof it is understandable that plaintiff grasps at the straw of arguing (Doralee Br. at 26) that possession and control of the premises by Cities Service is shown by the consent order between the New York State Conservation Department and MGO whereby MGO acknowledged responsibility for the oil discharges, agreed to take certain

action in respect thereof, and consented to a fine of $500. (E-51-E-52, see especially, ¶¶I and II). The consent order entered into by MGO cannot in any way establish that Cities Service operated and controlled the oil plant; indeed, it is proof to the contrary. An awareness by Cities Service of Monticello's involvement with the State Conservation Department, as indicated by memoranda in the files of Cities Service (E-20, E-40), certainly cannot be tortured into proof, as plaintiff's brief attempts to do, of "actual possession and control of premises by Cities Service". (Doralee Br. at 26).

Obviously aware that its prior argument is wholly inadequate to establish any actual possession or control of the premises by Cities Service, Doralee in its brief argues that Cities Service was in contructive possession of the oil plant. (Doralee Br. at 27-28). In support of its argument to this effect, the plaintiff urges that the terms of the state court stipulation (E-118-E-120) constituted, in some unexplained way, an assumption of operating control and responsibility by Cities Service. The only undertaking of Cities Service and MGO, under the state court stipulation, was to submit plans and specifications for an oil separator system (which were timely submitted, E-143-E-147) and either to construct the separator system after court approval of the plans (the court did not act on the plans) or to abandon the use of the premises as an oil plant. (E-119). The quotation from the stipulation in Doralee's brief artfully tailors

and truncates the several provisions of the stipulation so as to make it appear that the stipulation required the defendants to install an oil separator system whereas, in fact, it gave them the option of either installing the system or discontinuing operations. (See, Doralee Br. at 27-28). The record is uncontroverted that the option of discontinuing operations was elected and accomplished.

It is clear from the face of the state court stipulation that Cities Service did not, as suggested by the trial judge, commit itself by execution of the stipulation to undertake operation and control of the oil plant premises. (A-329/15-17). Doralee adverts, in its brief (at 28), to the court's charge that the jury consider whether or not, by the stipulation of settlement, Cities Service undertook to correct the oil spillage and thereby assumed the responsibility which would devolve on the plant operator which, by clear legal obligation, had the responsibility to operate the plant in a manner which would cause no damage to other parties. In arguing that the foregoing charge "...permitted the jury, if it had seen fit, to ignore the clear and unequivocal language of the agreement" (Doralee Br. at 28), Doralee is stating, in effect, that the court below committed error in submitting to the jury the question of the meaning and effect of "...the clear and unequivocal language of the agreement". (Doralee Br. at 28) (emphasis supplied).

The state court stipulation does not in any way establish constructive possession of the oil plant by Cities Service. Nor does it constitute a contract, as erroneously charged by the court herein. (A-1267/8-A-1268/20). Certainly, it was error on the part of the court to submit to the jury the construction of what Doralee acknowledges to be "clear and unequivocal language" to determine whether or not the state court settlement agreement constituted an agreement to prevent oil spillage. The stipulation accorded the defendants the option to discontinue operation of the oil plant; the undisputed proof in this case shows that this option was taken and carried out. It is equally clear from the third paragraph of the stipulation (E-118, ¶3) that Doralee, which received $12,500 in settlement of claims made in the litigation, did no more than agree to forbear, for a period of six months from April 25, 1972, from instituting another suit against the defendants. Self-evidently, in reserving further action against the defendants in the stipulation, Doralee indicated its awareness that further grounds for suit might eventuate after the execution of the stipulation.

The simple and uncontroverted fact of this case is that, in order to achieve federal jurisdiction as between itself and Cities Service, Doralee advisedly did not join MGO as a defendant. Doralee made a losing bet, since, although it adduced proof that would have readily proven MGO to be liable,

it wholly failed to establish the operation and control of the premises by Cities Service which was an indispensable predicate for a finding of liability against it. As shown above, it also failed to show the existence of an agreement in the form of the stipulation of settlement in the state court action whereunder Cities Service could be held liable herein.

Doralee has failed to show any basis in fact or law whereunder Cities Service, clearly not in control of the operations of the oil plant, could be held liable for operating deficiencies resulting in alleged damage to plaintiff.

II

THE SHOWING OF THE INADEQUACY OF DORALEE'S PROOF OF DAMAGES IS NOT MET BY DORALEE'S BRIEF.

Doralee's proof of damages may be broken down into: (a) proof of the fact of damage, and (b) proof of the amount of damage.

Doralee's brief does not demonstrate that a tenable showing of either the fact or the amount of damage was made during the trial of this action. The record establishes, and it is documented herein, that there was, in fact, no damage attributable solely to the alleged oil spillage, but that there existed several concurrent causes of damages. Notwithstanding the statement in Doralee's brief that the spilling of raw sewage on plaintiff's premises during the period in question

"...had little support, if any, in the record and was at most a jury question" (Doralee Br. at 30), this verbal effort to sweep away the evidence of the presence of sewage cannot stand in face of the record. Not only did Cities Service request jury instructions to this effect, (A-1354), the evidence regarding the sewage, and other causes, comes as an admission from Dora Huss, president of the plaintiff corporation. By letter dated September 20, 1972, she wrote of:

> ...gross pollution of both my lakes and land as a result of inadequate provisions for disposing of sewage and overspills of oil discharged to my land and ponds.

(E-87). This written admission of concurrent causes of damage necessarily brings into application the case of Chipman v. Palmer, 77 N.Y. 51, 33 A.L.R. 566 (1879), (cited previously, Br. at 42-43; see also, O'Donnell v. City of Syracuse, 184 N.Y. 1, 76 N.E. 738, (1906); Ponderosa Pines, Inc. v. Queens Farm Dairy, Inc., 48 App. Div. 2d 760, 368 N.Y.S. 2d 358 (4th Dep't 1975); and Gallon v. Hussar, et al., 172 App. Div. 393, 158 N.Y.S. 895 (2d Dep't 1916). Doralee's brief makes no response whatsoever to the law represented by these decisions.

In the aforementioned letter of September 20, 1972 Mrs. Huss wrote:

> As of this writing I own 26+ acres operated as a summer bungalow resort. To state that it is also being used as the 'area sewer' would not be an overstatement.

(E-90). In a letter of October 6, 1972 to the New York State Conservation Department, Mrs. Huss wrote:

> ...there is a heavy discharge of raw sewage to my property. This has been traced to almost every dwelling on Cold Spring Rd (private as well as commercial.)

(E-93). It is clear from the second paragraph of plaintiff's Exhibit 65, a letter from the New York State Department of Environmental Conservation to Mrs. Huss, that as of November 14, 1972 there still existed the sewage problem about which Mrs. Huss had written the department (E-97) and that it coincided in time with the oil pollution for which she makes claim herein. Mrs. Huss' trial testimony was:

Q Did you observe that raw sewage descended from those homes on to your property?

A Yes.

(A-685/18-20);

Q It had a strong odor, didn't it?

A Not particularly, no.

Q It did not have a strong odor?

A It had an odor.

Q A noticeable odor?

A Yes.

Q An odor of raw sewage?

A Yes.

(A-689/9-14). Mrs. Huss admitted that the raw sewage could be seen and smelled. In light of these admissions by Doralee's president, which stand uncontradicted on the record, there is no basis upon which the plaintiff may contend that the concurrent presence of visible malodorous sewage at the time of the alleged oil pollution represented a jury question. This fact was uncontrovertibly established and the rule of Chipman v. Palmer, supra, clearly denies plaintiff any right to damages for the oil pollution in the absence of proof isolating this cause of damage from other concurrent causes.

A further significant element of proof under the rule of Chipman v. Palmer, supra, is found in a Verified Bill of Particulars served by Doralee in yet another state court action brought against the Village of Monticello. This Verified Bill of Particulars was erroneously denied admission into evidence. (E-140-E-142). In paragraphs 5, 6 and 7 of this Verified Bill of Particulars, Doralee claimed damages due to construction taking place on its premises for the years 1972-'74 and thereafter by reason of alleged acts and omissions of the Village in the course of installing a sewer line through a right of way on Doralee's premises. It is interesting to note

that part of the damages are set forth in a statement of Rosch & Weston which should have been, and was not, annexed to the exhibit at the time it was marked for identification. Robert Rosch, of the same firm, testified on behalf of Doralee as to alleged damages to its premises. (A-194-A-224). The period of time encompassed in Doralee's damage claim in the Village of Monticello case is concurrent with the time period for which damages are claimed in this case. It is apparent, therefore, that the damage Doralee asserted to have been caused by the Village of Monticello in that case is to be included with the sewage damage as further concurrent damage. The minimal effect of the oil contamination claimed to have occurred at Doralee's premises is shown in its own Exhibit 28, a report of the New York Department of Environmental Conservation, wherein it is established by the Department's own records that not a single fish placed in samples of the allegedly polluted water failed to survive a lengthy period - six days - in such water. (E-70, E-71). Not only did the fish "survive", they were "alive", "normal" and "sound" after the six days. Id. Also significant on the question of whether there was damage in fact was the proof that, during the period of alleged pollution, plaintiff filed notice of intent to install 17 mobile homes on its premises (E-110) and the fact, admitted by plaintiff's counsel, that during the years in which plaintiff alleges pollution to have occurred, 81.3%[3] of her rentals were effected

3. This figure represents "repeaters", i.e. repeat summer tenants for 1974-'76. Sixty-Three and seven/tenths per centum (63.7%) of the tenants for 1965-'73 were "repeaters", also. (E-130).

on a renewal basis to tenants who had rented during prior years (E-126; A-926/4), and, indeed, at annually increasing rents (E-98). This practical demonstration that plaintiff considered the premises desirable for further development and the tenants considered them desirable for renewal rental strongly offsets any claim of damage, as does the plaintiff's concession that there is no claim of diminution of value of plaintiff's premises. (Doralee Br. at 37-38; A-731/10-21).

The defendant's challenge to the amount of plaintiff's damage stands unanswered in the Doralee brief. There is no dispute by plaintiff that the testimony of alleged rent loss which it offered through Edison, its real estate expert, was based only on a showing of alleged differences in rents and rates of escalation between Doralee and other bungalow colonies. There was not an iota of proof in the trial record to establish that the asserted differences between the rents of Doralee and the other bungalow colonies were attributable to oil pollution or any other consideration. Edison testified only to a "raw" or absolute difference in the rents with no greater effect than if he had testified that the rents in New York's most expensive apartment house were higher than those in the most modest tenement. Edison admitted at this trial in January 1977:

> Q Mr. Edison, are you aware of what was the condition of the Doralee premises in the year 1972?

A No sir, I was not.

Q Are you aware of the condition of those premises as of, let's say, summer or fall of 1973?

A Counselor, I was never on the property before last year.

(A-542/19-25); and he later said:

I was not comparing comparable properties.

I am comparing comparable rentals.

(A-547/24). Similarly, he stated, as follows, that he did not consider comparability of neighborhood:

Q What about the neighborhood? Whether there is commercial establishments around? Don't you consider that in determining what is comparable property?

A That's not what I was doing.

Q In this case you did not consider that; is that correct?

A Not at all.

(A-549/6-12). He stated "I was not comparing bungalow colonies" (A-551/10) and that "I was comparing rent rolls". (A-551/6).

Edison admitted that the dumping of sewage would have a "minus" effect on rents. (A-552/11-14).

Cities Service argued that Edison's testimony as to differences between rents at Doralee and other bungalow colonies was based on hearsay and for that reason, as well as others, did not constitute proper proof of loss of rents. Doralee, citing (at 65) Bailey v. United States, 325 F.2d 571 (1st Cir. 1963), argues that hearsay may be used as the basis of expert opinion. The case refutes plaintiff's contention, since it approved opinion testimony of value by an expert in a condemnation on the basis of actual sales of nearby properties; whereas, in the instant case, Edison did not testify as to his opinion of rental values and the reason for differences in rents, but only as to what purported to be arithmetic differences in rents. He did not state that the difference was due to oil pollution or what would have been Doralee's rents if there had been no pollution. Cities Service's request to change pointed out the need for such proof. (A-1354). His testimony was that he dealt with average rents, not actual rents. (A-536/21-A-537/6; A-534/8-20; 535/11; A-536/13; A-536/16; A-511/3). He did not look at leases. (A-502/20-A-503/4; A-504/15; A-521/12-21). Bearing in mind that he was presented as a witness doing no more than to compare the differences between plaintiff's rents and those at other bungalow colonies, it becomes clear that his hearsay, non-specific, testimony of "average" rents at five different bungalow colonies, without regard to comparability

with Doralee, renders his testimony unacceptable, even to prove the legally meaningless fact that Doralee's rents differed from rents elsewhere. This is particularly so in view of his admission that rents find their own level in the marketplace. (A-538/16-22).

In light of the undisputed fact that Doralee's only witness as to alleged loss of rental value did not offer any opinion whatsoever to explain the differences between the Doralee rents and those at other bungalow colonies, but merely made an arithmetic finding on the basis of hearsay as to the amount of such differences, it necessarily follows that there was no basis on which such differences could have been given to the jury for fixation of resulting damages. 25 C.J.S., Damages, §§42-44; 25A C.J.S., Damages, §155. In this connection it is important to bear in mind that the jury's fixation of the amount of compensatory damages was based substantially on the rent differentials testified to by Edison. (A-1341).

The second element of damage as to which Doralee's brief makes no adequate response is the testimony by its witness, Rosch, that the reasonable cost of dredging the lake and removing the stumps was $21,000. (E-1; A-203/12-A-205/3). The plaintiff's trial counsel acknowledged that Doralee asserted no claim for diminution in value of the premises. (A-731/10-21; Doralee Br. at 37-38). In light of this concession, and under the rule of Hartshorn v. Chaddock, 135 N.Y. 116, 31 N.E. 997 (1892), it follows that the alleged

cost of restoration may not be recovered for the self-evident reason that, absent diminution in value by reason of the condition of the pond bottom, there was no reason to effect a dredging thereof. This is a purely legal consideration, wholly apart from the admission of plaintiff's witness Rosch that he had no qualificaion to determine whether there was oil on the lake bottom, that he knew that, because oil is lighter than water, it does not settle to the bottom and that, rather, at the bottom of lakes there is found rotted and decayed vegetation. (A-214/7-A-215/12). At page 38 of Doralee's brief, it is argued that Cities Service should have proved, or offered to prove, that there was no diminution in value. This argument is fallacious. Doralee conceded that there was no diminution in the value of the property. This removed the cost of dredging as an item of damage properly before the jury. An offer of proof was not necessary. Fortunato v. Ford Motor Company, 464 F.2d 962, (2d Cir.), cert. denied, 409 U.S. 1038 (1972).

Doralee's response to Thomann v. City of Rochester, 256 N.Y. 165, 176 N.E. 129 (1931), cited in Cities Service's main brief for the proposition that in this action at law plaintiff may recover damages only up to the date of commencement of action, is feeble. (Br. at 48). In response to this New York Court of Appeals decision, written by Judge Cardozo in 1931, Doralee cites a 1912 New York State Supreme Court decision. (Doralee Br. at 39). It is submitted that, under Thomann, supra, the plaintiff's proof of damages is limited to the

period between the efective date of its general release (E-85) and February 28, 1973, the date on which it filed this action. The failure of the court to so charge the jury constitutes clear error. (A-1280/8-A-1282/22). As a matter of law, there was a total absence of proof sufficient to entitle plaintiff to a verdict allowing compensatory damages.

So far as punitive damages are concerned, Doralee cites Williams v. City of New York, 508 F.2d 356 (2d Cir. 1974), for the proposition, apparently, that the requirement that punitive damages may not be imposed on a corporation unless proof is adduced of authorization, participation or ratification by officers and directors representing the corporation's executive power, has been reduced. See, Koufakis v. Carvel, 425 F.2d 892 (2d Cir. 1970). However, Doralee completely ignores the fact that there is nothing whatsoever in the record of this case that shows executive approval by Cities Service at any level. The references in Doralee's brief (Doralee Br. at 48) to a number of interoffice memoranda of Cities Service, unrelated in any way to any authorization, approval or ratification of acts that would contribute to or result in pollution from the MGO oil plant and dated after MGO ceased operations at the plant, and without proof of the managerial status of any party to the memoranda, is a striking tacit admission that Doralee is possessed of no proof of corporate participation in the action that plaintiff seeks to charge to Cities Service but which is attributable solely to MGO. Similarly, Doralee's

brief does not in any credible way deny the absence of proof in the trial record of any acts on Cities Service's part or of any malice or illwill by it toward Doralee. The mischaracterization in Doralee's brief of the prior state Supreme Court stipulation of settlement as a "mandatory injunction" that was violated by Cities Service is an affront to anyone who reads the stipulation. There is no injunction stipulated therein; indeed, it is a stipulation that terminated the action without judgment or decree of any nature. The stipulation was performed by the closing down of the oil plant; it was not breached. Similarly, Doralee's imputation that Cities Service was violator of the state pollution laws is utterly belied by the record which shows findings and consent by MGO that MGO alone was the violator in a proceeding to which Cities Service was not even a party. (Doralee Br. at 49).

The trial court clearly erred in permitting the question of punitive damages to go to the jury. An interesting question in this connection, which may be of first impression, is whether a tendered stipulation that a party is financially able to meet punitive damages in any amount that may be found should be accepted as a means of affording the plaintiff a proper basis for jury evaluation and, at the same time, sparing the defendant the prejudice that inevitably results from placing in the jury's hands a balance sheet showing a net worth in excess of $1,300,000,000. A case cited by Doralee, Rupert

v. Sellers, 48 App. Div. 2d 265, 368 N.Y.S.2d 904 (4th Dep't 1975), is useful on this point:

> ...since the purpose of presenting to the jury the amount of defendant's wealth is only to furnish to them a guide for suitable punishment, there is no need for a plaintiff to explore the details of a defendant's assets and liabilities.

Id. at 272, 368 N.Y.S.2d at 913.

III

DORALEE'S BRIEF FAILS TO REBUT CITIES SERVICE'S SHOWING THAT IT WAS ENTITLED TO, AND WAS ERRONEOUSLY DENIED, THREE PEREMPTORY CHALLENGES

There is no question that the trial court did not allow Cities Service three peremptory challenges; it is conceded that the court allowed:

> Cities Service and MGO three joint peremptory challenges, plus two additional ones - one separate peremptory challenge for each of them. (emphasis added).

(A-103/5-A-104/5). The cited portion of the record shows that Cities Service counsel claimed three peremptory challenges for his client and excepted to the limitation imposed by the court. Id.

It is beyond the ability of the plaintiff to deny the mandate of 28 U.S.C. §1870 that a sole defendant is entitled to three peremptory challenges, or that Cities Service is the sole defendant, MGO being a third-party defendant in

an adversary posture in relation to Cities Service, the third-party plaintiff. In Doralee's brief it is argued, in effect, that the statute and the legal alignment of the parties could be disregarded because Cities Service contemplated no issue that would have to be passed on by the jury as between it and MGO. (Doralee Br. at 57). In answer to this, it suffices to say that Cities Service sought from the jury a verdict against MGO on which judgment would be entered and that the statute is mandatory.

The cases cited on this point in plaintiff's brief provide no authority for the court's disregard of Cities Service's right under the statute to the three peremptory challenges. The case of Connecticut Mutual Life Insurance Company v. Hillmon, 188 U.S. 208, 23 S. Ct. 294, 47 L.Ed. 446 (1903), is not in point on the facts herein. (Doralee Br. at 55). In that case, the court said of the appellant that:

> ...having failed to exhaust its peremptory challenges, it stands in no position to complain that it was deprived of the right to challenge others.

Id. at 212, 23 S. Ct. at 295, 47 L.Ed. at 449. In the instant case, Cities Service sought to exercise a peremptory challenge and was informed by the court that its challenges had been exhausted. (A-154/8-16).

Standard Industries, Inc. v. Mobil Oil Corporation, 475 F.2d 220 (10th Cir.), cert. denied, 414 U.S. 829 (1973),

(cited at Doralee Br. at 55), is a case in which two plaintiffs, each of which was granted three peremptory challenges, complain because they were not afforded the total of ten challenges that were allowed to the five joint defendants. The Tenth Circuit Court of Appeals found no error, pointing out that having given each joint defendant three peremptory challenges, as required by the statute, there was no right to demand numerical equality with the number of total challenges afforded the five joint defendants. This case, in articulating the literal application of 28 U.S.C. § 1870, supports the Cities Service position herein; it gives no comfort to the plaintiff. Id.

Matanuska Valley Lines v. Neal, 255 F.2d 632 (9th Cir. 1957), (cited at Doralee Br. at 55-56), does not involve the right to peremptory challenges under the United States Code but, rather, under the Alaska Code of Laws. On its facts, the case had nothing to do with the challenge rights of a sole defendant, as in the instant case; it involved the question of the number of challenges to which defendants were entitled under the Alaska law in a situation where three actions were consolidated and tried together.

Doralee endeavors, unsuccessfully, to distinguish John Long Trucking, Inc. v. Greear, 421 F.2d 125 (10th Cir. 1970). (Doralee Br. at 56). The case, in declaring a party's rights absolute under 28 U.S.C. §1870, and in literally applying the statute, clearly supports Cities Service's position.

Gafford v. Star Fish & Oyster Company 475 F.2d 767 (5th Cir. 1973), (cited at Doralee Br. at 57), does not involve the number of challenges to which a party is entitled but, rather, a claim of grievance arising from the court's requirement that plaintiff exercise all his peremptory challenges before the defendant was required to exercise any of its challenges. Id. The decision of the Fifth Circuit supporting this procedure, but suggesting it be changed, has no relevance here. The right to three peremptory challenges is conferred by statute. The trial judge's ruling in that case - in an area of acknowledged discretion - does not represent approval of a violation of the nondscriminatory rights herein.

The case of Carey v. Lykes Brothers Steamship Company, Inc., 455 F.2d 1192 (5th Cir. 1972), (cited at Doralee Br. at 57), is not a relevant authority here since it involved the appeal of a third-party defendant alone from the allowance of three peremptory challenges to the defendant and third-party defendant collectively and resulted in a clear statement by the United States Court of Appeals for the Fifth Circuit that there can be no grievance where 28 U.S.C. §1870 is literally applied. In the instant case, the requirement of the statute was ignored.

Moore v. South African Marine Corporation, Ltd., et al., 469 F.2d 280 (5th Cir. 1972), (cited at Doralee Br. at 57), is an affirmance by the Fifth Circuit of the trial judge's allowance of three peremptory challenges, collectively, to a defendant and third-party defendant. The appeal was by the

third-party defendant only; the appeal court did not pass on the rights of the defendant. It is submitted, however, that a reversal would have been appropriate in that case if the defendant had appealed.

The question as to peremptory challenges is not of mere academic import; it relates to Cities Service's desire to challenge a prospective juror who had stated "I have an interest in and am very concerned about the environment...." (A-151/14-15). The gravity of the error is emphasized by the court's perfunctory interrogation (A-153/9-25)[4] of the juror after being asked by Cities Service counsel to inquire further as to the disclosed possible basis of challenge (A-153/5-25), and the denial of the request of Cities Service counsel to examine the prospective juror. (A-154/2-5). The trial court in this case erred whether or not Cities Service "waived" a peremptory challenge; the fact is that the denial of Cities Service's right to three peremptory challenges forclosed it from applying a peremptory challenge to a juror whose voir dire displayed a bias strongly adverse to Cities Service's position.

As stated in United States v. Dellinger 472 F.2d 340 (7th Cir.), cert. denied, 410 U.S. 970 (1972):

> ...it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause.

4. Federal Circuit Judge Donald P. Lay of the Eighth Circuit is quoted as saying that he has never known a juror to respond negatively to a trial judge's question as to whether that juror can serve fairly and impartially. W.S. Frates and A. G. Greer, "The Jury Voir Dire: The Lawyer's Perspective", 2 Jour. Sec. Litig. 17, at 18 (A.B.A., Winter 1976).

Id. at 367. The United States Supreme Court has said in Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 12 S. Ct. 909, 36 L.Ed. 706 (1892):

> The denial of the rights of challenge, secured to the defendants by the statute, entitles them to a new trial.

Id. at 294, 12 S. Ct. at 912, 36 L.Ed. at 710. It is submitted that the plaintiff has utterly failed to rebut the showing that Cities Service is entitled, at least, to a new trial under this rule.

IV.

THE ERRORS OF THE TRIAL COURT WERE NUMEROUS AND SUBSTANTIAL

Cities Service objected strenously to the substitution of a claim of breach of the settlement agreement for the originally pleaded cause of action to rescind the agreement. (A-854/1-A-857/4). Doralee cites three authorities to justify the court's action. (Doralee Br. at 61). One of the cited authorities, 3 Moore's Federal Practice, §15.13(2) states, at 994:

> As has been indicated, there must ordinarily be either express or implied consent of the parties for the trial of issues not raised in the pleadings.

Id. It is self-evident that the assertion of a claim of breach of agreement raises issues different from a claim for rescission of the agreement. Since the claim of breach of the settlement

agreement was raised at trial for the first time, Cities Service was unprepared to meet it, not having had an opportunity, by pre-trial disclosure, to determine plaintiff's contentions as to the nature of the alleged breach and the damage consequences thereof. Since Cities Service gave no express or implied consent to the amendment but, rather, entered positive objection thereto, it was error for the court to have allowed the amendment and submitted the new claim to the jury.

Northern Oil Company v. Socony Mobil Oil Company, 347 F.2d 81 (2d Cir. 1965), (cited at Doralee Br. at 61), states no more than the ruling that if a defendant did not object to the presentation of proof under a new theory of claim, it could not claim error in the allowance of a motion to conform the pleadings to the proof. In the instant case timely and positive objection to the new claim was expressed by Cities Service. (A-853/15-A/857/4).

In Jackson v. Atlantic Coast Line Railroad Company, 317 F.2d 95 (4th Cir. 1963), (cited at Doralee Br. at 61), the Fourth Circuit Court of Appeals sustained liability in an oil pollution case on the theory of nuisance, although only negligence had been pleaded. The decision is rational, because the facts establishing the negligence claim would also establish nuisance and the defense proof would be the same under either theory. Such is not the situation in the instant case; the defense of, and preparation for, a claimed breach of agreement would be different from that for rescission of the agreement. It is

interesting to note that in Jackson v. Atlantic Coast Line Railroad Company, supra, the party which occupied and controlled the premises from which the waste oil emanated was the one held liable to the plaintiff. Id.

In response to the Cities Service claim of error in the submission to the jury of the question of whether the plaintiff's release to Cities Service (prepared by, and executed in the presence of, Doralee's lawyer) should be reformed to provide an effective date of April 25, 1972 rather than October 24, 1972, Doralee responds by citing authority (at 63) that there may be reformation where there is a unilateral mistake as to a release given without consideration. This authority is inapposite. Buffalo Electric Co. v. State of New York, 9 App. Div. 2d 372, 194 N.Y.S. 2d 72 (4th Dep't 1959), (cited at Doralee Br. at 63),, involved a question of whether receipt of a "final" payment check by a contractor after assertion of additional claims constituted a release under a contract which provided that acceptance of "final" payment would constitute a release of all claims. The court found a question of fact as to intention to release and also suggested that the implied release represented by the check may have been gratuitous and without consideration as a matter of law. No such circumstances exist in the instant case. Here, a formal release, drafted by, and signed in the presence of releasor's lawyer, was given in exchange for a settlement payment of $12,500. It was given for substantial consideration, not

gratuitously, and there is no basis on which it may be impeached or reformed.

In re Kelleher's Will, 19 App. Div. 2d 147, 241 N.Y.S. 275 (4th Dep't 1973), (cited at Doralee br. at 63), involved affirmative fraud in the procurement of the release. No such claim is made or exists here.

The question of reformation of the release is of substantial importance. If plaintiff released claims through October 24, 1972, as the release expressly provides, then plaintiff could not claim damages for the 1972 summer occupancy period, since it ended on Labor Day. However, if plaintiff released claims only through April 25, 1972, as the court permitted the jury to find, then the plaintiff possessed claims for the 1977 summer season. As was urged during trial (A-648/14-19), the referral to the jury of an unpleaded claim for reformation of the release was improper. The error lay in the lack of substantive basis, as a matter of law, for such reformation, Pimpinello v. Swift & Co., 253 N.Y. 159, 170 N.E. 530 (1930) and 6 N.Y. Jur., Cancellation and Reformation of Instruments, §§39, et seq., and also the lack of procedural justification, as expressed, supra, in 3 Moore's Federal Practice, §15.13(2) at 994 for allowing an entirely new cause of action to be introduced for the first time at trial, over objection. (A-648/14-19; A-649/7-8).

The trial judge referred to the jury a number of questions that he should have decided as a matter of law. On the record of this case it could not be found that Cities

Service, a non-actor and not the operator of the oil plant, could be found guilty of wanton and reckless conduct; nevertheless the court so charged. (A-1283/9-16). Similarly the referral to the jury of the question of whether the settlement agreement required Cities Service to correct certain conditions gave them a question of law which should have been decided by the court. (A-1156/23-A-1157/14).

The court below referred to the jury the question of whether the general release signed by the plaintiff which released all claims through October 24, 1972 was to be given effect in the terms it was written or to be construed to fix April 24, 1972 as the date of release. (A-1264/17-A-1265/18). The effect and meaning of the release was a question of law that should have been decided by the court without referral to the jury on the basis of Mrs. Huss' testimony that the release was prepared by and executed in the presence of her attorney and delivered in exchange for a settlement payment of $12,500 and on the basis of the law which precluded plaintiff from seeking at the trial for the first time the unpleaded relief of reformation.

The court referred to the jury the question of whether the stipulation of settlement on which it permitted plaintiff to base a cause of action for breach of contract, required Cities Service to correct the oil pollution. (A-1267/17-A-1268/20). The stipulation of settlement is clear and

unambiguous and there was no question of fact as to its meaning and requirement. The Court should have instructed the jury, as a matter of law, as to the meaning and obligation of the stipulation. The proper construction by the court would have been that the stipulation afforded the defendants in the state court action the option to install an oil separator system or to discontinue operaton of the plant, that their discontinuance of operations represented compliance with the stipulation and that the stipulation did not represent a contract on which plaintiff could effect recovery in this action.

The trial court referred to the jury the question of whether Cities Service retained control of the premises that it leased to MGO. (A-1268/21-A-1269/16). The question of control was clearly resolved by the provisions of the lease between Cities Service and MGO and by the undisputed proof, from MGO's general manager, that it alone possessed and operated the premises, with no presence of Cities Service personnel. In the circumstances, the question of control was one of law; it should not have been referred to the jury. Cities Service requested a charge to this effect. (A-1344 and A-1347).

The court charged the jury with the language of the New York State Environmental Conservation Act in connection with punitive damages. (A-1283/17-A-1285/11). The case of Walker v. Sheldon, 10 N.Y.2d 401, 223 N.Y.S. 2d 488,

179 N.E. 2d 497 (1961), (cited at Doralee Br. at 50), does not in any way justify the reading of a criminal statute to the jury as a basis for imposing punitive damages on a party who was not found guilty under the criminal statute or even involved in proceedings brought thereunder. The reading of the statute may be likened to the introduction of inflammatory proof at a trial; it could operate only to inflame and stimulate the jury to strong action. There is nothing in plaintiff's brief that justifies this when MGO alone, not Cities Service, was involved in the consent order of the New York State Department of Environmental Conservation.

The court charged that the jury might consider whether Cities Service entered into the state court stipulation of settlement in bad faith and whether Cities Service:

> ... is guilty of misconduct so flagrant as to transcend mere carelessness, in which event you may find it deserves punishment more severe than would result from an award of compensatory damages alone.

(A-1286/16-A-1287/2). This charge completely disregards the undisputed record proof that the consideration called for by the 1972 settlement agreement was paid, the plans required to be filed thereunder were filed within the required time, and compliance with the stipulation by electing the alternative of discontinuing operation of the oil plant was effected. There was not a scintilla of proof of bad faith. Moreover, the erroneous and prejudicial charge compounds the error by implying that Cities Service had some obligation under the settlement

stipulation which it failed to perform, to the plaintiff's damage. The charge that the jury might find Cities Service guilty of flagrant misconduct needs no comment - there was no proof of any conduct on the part of Cities Service which damaged plaintiff; MGO was in sole control of the oil plant.

Doralee's brief (at 67) denies that the trial judge castigated Cities Service counsel in the presence of the jury, notwithstanding the fact that the Cities Service brief (at 63) cites the portion of the record (A-718/14-A-719/3) in which this occurs. It is submitted that the court's abrupt "squelch" of Cities Service counsel, and its remarks supportive of the witness' refusal to call the release anything other than a "form", substantially discredited the position of Cities Service and its proof before the jury and placed the imprimatur of court approval on a witness who, on this record, may be fairly characterized as intransigent and less than credible.

This was a complicated and lengthy case. The trial judge informed the jury:

> I am not going to marshal or sum up or put together or collect together, ladies and gentlement, for you the evidence on each side of the case.

(A-1278/10-12), and it did not do so. It is submitted that, as stated in Pagan v. S.D. Childrens Center, Inc., (App. Term. Kings County Supreme Court) N.Y.L.J., 8/9/77, at 12, Col. 1 (Pino, Rinaldi and Weinstein, JJ.), the court should have

discussed the evidence and related it to the principles of law that were charged, rather than make an abstract charge. Pagan v. S.D. Children's Center, Inc., supra, also found a basis for a new trial in a rebuke administered by the court to defendant's counsel in the presence of the jury.

CONCLUSION

A directed verdict in favor of Cities Service should have been entered and the motion of MGO for dismissal of the third-party complaint should have been denied. There was substantial error below which, at the very least, requires a new trial.

THE JUDGMENT BELOW SHOULD BE REVERSED AND JUDGMENT DIRECTED FOR CITIES SERVICE OR ELSE, A NEW TRIAL SHOULD BE ORDERED AND THE ORDER DISMISSING THE THIRD-PARTY COMPLAINT REVERSED.

Respectfully submitted,

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SECOND AND ELEVENTH JUDICIAL DISTRICTS

By Pino, P.J.; Rinaldi, and Weinstein, JJ.

PAGAN, res, v. S.D. CHILDREN'S CENTER, INC., ap (K)— Judgment is unanimously reversed without costs and a new trial ordered.

In this negligence action for personal injuries, defendant appeals from a judgment entered upon a jury verdict in plaintiff's favor.

In our opinion, a new trial is required. The court improperly rebuked the defendant's attorney before the jury about a tactic that does not appear in the record. Secondly, the trial court's charge to the jury was improper. It stated that there were discrepancies in the testimony of the two witnesses for defendant. It concluded that these discrepancies were "like night and day." Defendant's attorney took exception to this aspect of the charge. In reality, the testimony of the two witnesses alluded to by the court were not inconsistent or contradictory. Moreover, this issue was merely tangential to the issue of defendant's liability. The above error was compounded by a lack of specificity in the overall charge, in particular, by the failure to discuss the evidence and to relate it to the principles of law that were charged, and to apply to each party's version the pertinent statutory and decisional law. Mere abstract propositions of law applicable to any case or more statements of law in general terms should not be given (Green v. Downs, 27 N. Y. 2d 205; Zipay v. Benson, 47 A. D. 2d 233). In the instant matter, the court completely omitted a review of the factual contentions of the parties except to pinpoint a tangential apparent discrepancy in the testimony of defendant's witnesses.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JAMES LEVERICH, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 185 ST. MARKS PLACE STATEN ISLAND, N.Y., 10301.

That on the 26 day of September, 1977, deponent personally served the within APPELLANT'S REPLY TO THE BRIEF OF DORALEE ESTATES, INC.

upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

JOSEPH D. AHEARN, Of Counsel
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Attorneys for Third-Party Defendants-Appellees, MGO Corp. and Monticello Gas and Oil Co., Inc.

James Leverich

Sworn to before me this
26 day of September, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

RICHARD WITHERS, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1526 Webster Ave. Apt.B-3 Bronx, NY 10457.

That on the 26 day of September, 19 77, deponent personally served the within APPELLANT'S REPLY TO THE BRIEF OF DORALEE ESTATES, INC. upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

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Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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Doralee Estates, Inc.

Richard Withers

Sworn to before me this
26 day of September, 19 77

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

Counsel Press, 55 West 42nd Street, PE 6-8460
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